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JUSTIFICATION TYPES OF ECONOMIC DAMAGES AND LOST PROFITS CAUSED BY THE VIOLATION OF INTELLECTUAL PROPERTY RIGHTS

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The article considers the methodological approaches to identify and study types of economic loss and loss of profits in violation of the exclusive rights. A classification criteria losses holders of counterfeit goods: direct economic losses associated economic losses, lost profits copyright owner, the copyright holder moral hazard. Grounded types of economic losses holders of each of the classifications. The main attention was paid to reducing consumer confidence in the goods and services produced with the use of a registered trademark. Proposed to consider reducing the market share, which was in the possession of the trademark holder. Defined as a loss of direct economic losses by the owner of license benefits and increase of constant cost of advertising and promotion, as well as an increase in unit costs holders logistics. The structure factors of profits attributed the shortfall in revenue or profit in two ways: by replacing parts original and counterfeit products due to disruption of the conclusion of commercial agreements with potential licensees. This group also include potential losses resulting from the total or partial failure of existing contractors from supplying products manufactured with the use of intellectual property. First consider the proposed direct economic losses holders of production excess production and related economic losses. The economic essence of the past is that the complexity of the production, sale and use of original products may affect the other products that are in some way connected with the main products.

Перерва П. Г., Ткачев М. М. Обґрунтування видів економічних збитків та упущеної вигоди, завданих порушенням прав інтелектуальної власності.

У статті розглянуто методичні підходи до визначення та обґрунтування видів економічних збитків та упущеної вигоди при порушенні виключних прав (прав інтелектуальної власності). Запропоновано класифікаційні ознаки втрат правовласників від контрафактної продукції: прямі економічні збитки, супутні економічні збитки, упущена вигода правовласника, моральна шкода правовласника. Обґрунтовано види економічних втрат правовласників по кожній із класифікаційних ознак. Основна увага була приділена зниженню довіри споживачів до товарів та послуг, вироблених з використанням зареєстрованого товарного знаку. Запропоновано враховувати зменшення частки ринку, яка була в розпорядженні правовласника товарного знаку. Визначено в якості прямих економічних збитків недоотримання правовласником ліцензійних вигод та збільшення частки умовно-постійних витрат на рекламу та стимулювання, а також збільшення питомих витрат правовласників на логістику.. До складу факторів упущеної вигоди віднесено недоотримання доходу або прибутку в двох напрямках: за рахунок заміщення частини оригінальної продукції контрафактом та внаслідок зриву укладення комерційних угод з потенційним ліцензіатами. До цієї групи також віднесено потенційні збитки, отримані внаслідок повної або часткової відмови діючих контрагентів від поставок продукції, виготовленої з використанням об'єктів інтелектуальної власності. Вперше запропоновано враховувати прямі економічні збитки правовласників від виробництва надлишкової

продукції та супутні економічні збитки. Економічна сутність останніх полягає в тому, що складнощі з виробництвом, продажами та використанням оригінальної продукції може позначитися на інших виробках, які певним чином пов'язані з основною продукцією.

Перерва П.Г., Ткачев М.М. Обоснование видов экономического ущерба и упущенной выгоды, причиненных нарушением прав интеллектуальной собственности.

В статье рассмотрены методические подходы к определению и обоснование видов экономического ущерба и упущенной выгоды при нарушении исключительных прав (прав интеллектуальной собственности). Предложено классификационные признаки потерь правообладателей от контрафактной продукции: прямые экономические убытки, сопутствующие экономические убытки, упущенная выгода правообладателя, моральный ущерб правообладателя. Обоснованно виды экономических потерь правообладателей по каждом из классификационных признаков. Основное внимание было уделено снижению доверия потребителей к товарам и услугам, производимых с использованием зарегистрированного товарного знака. Предложено учитывать уменьшение доли рынка, которая была в распоряжении правообладателя товарного знака. Определено в качестве прямых экономических убытков недополучение правообладателем лицензионных выгод и увеличение доли условно-постоянных затрат на рекламу и стимулирование, а также увеличение удельных расходов правообладателей на логистику. В состав факторов упущенной выгоды отнесены недополучение дохода или прибыли в двух направлениях: за счет замещения части оригинальной продукции контрафактом и вследствие срыва заключения коммерческих соглашений с потенциальными лицензиатами. К этой группе также отнесены потенциальные убытки, полученные в результате полного или частичного отказа действующих контрагентов от поставок продукции, изготовленной с использованием объектов интеллектуальной собственности. Впервые предложено учитывать прямые экономические убытки правообладателей от производства избыточной продукции и сопутствующие экономические убытки. Экономическая сущность последних заключается в том, что сложности с производством, продажами и использованием оригинальной продукции может сказаться на других изделиях, которые определенным образом связаны с основной продукцией

Problem. Safety and protection of intellectual property in today's market economy Ukraine is important in production and business activities of its participants, who will not only be clear about the nature of intellectual property, but also to a certain material costs may lead violation of their rights needed to protect intellectual creations of man, his interest in the moral and material spheres that arise in its activities in various areas of innovative sectors.

Analysis of recent research and publications. Certain developments in the field definition and justification types of economic losses and profits in violation of the exclusive rights is A.V.Kostina in scientific publications [1-3] V.I.Muhopada [4] A.M.Kozyryeva [5] P.M.Tsybulova [6] V.H.Zinova [7] K.A.Orkinoyi [8] and others. [9; 10; 11]. Renowned researcher loss of intellectual property holders A.V.Kostin [1-3] in the assessment of losses holders ignores any related losses or moral damages, which are usually considered in court for violations urge exclusive rights to compensation. In our opinion, these types of damages should consider and make recommendations on their definition, and are another matter whether or not they are compensated by voluntary agreement of the offender, or by court order.

The article is a study of guidelines to identify areas' economic losses and profits in violation of the exclusive rights.

Statement of the main research. Compensation for loss - a reimbursement of expenses incurred legal or natural person whose rights are violated, and no revenues that could get the person

under normal conditions of turnover, if his right was not violated. Our proposals to determine the classifications losses poruschennya exclusive rights given in Figure 1.

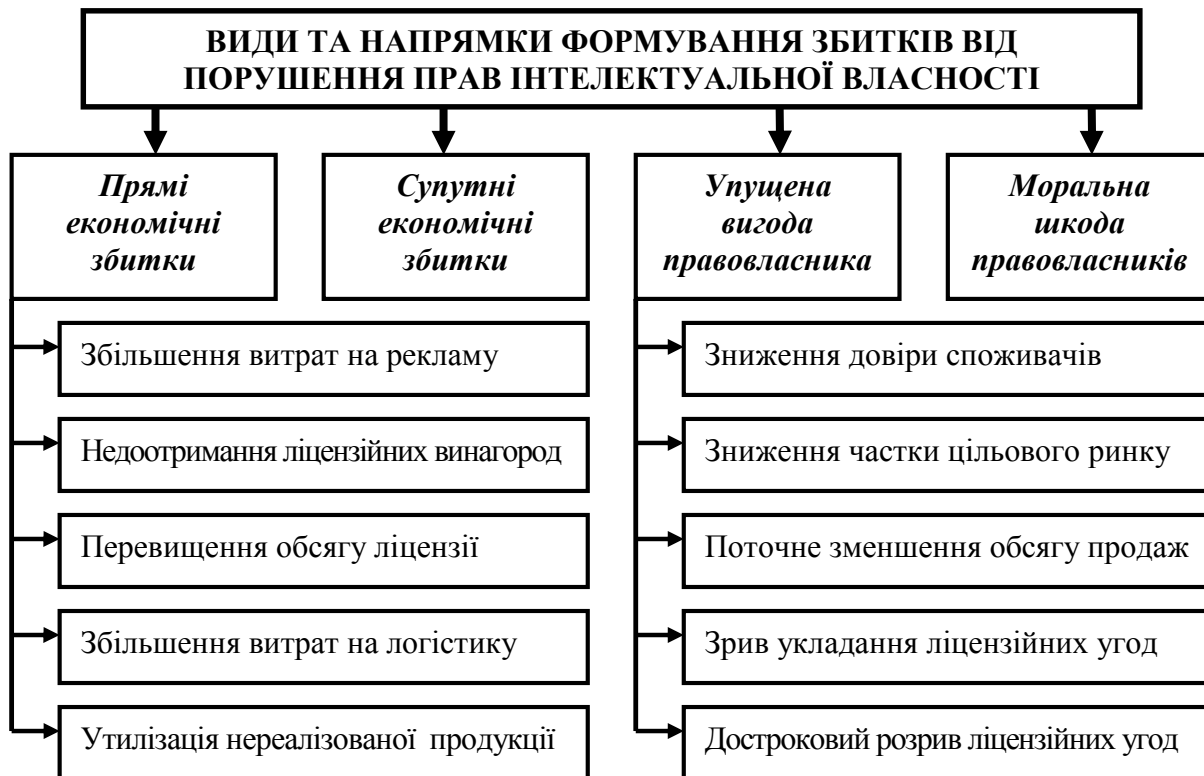


Figure 1 - Classification of areas of formation damage in violation of the exclusive rights

The generalization of existing scientific research allowed the authors to isolate, to complement and justify the following types (Types formation) economic loss of patent holders from infringement of intellectual property rights (counterfeit, fake).

1. Reducing consumer confidence in goods and services, manufactured using a registered trademark. The presence of this type of damage occurs in the case where counterfeit products have significant differences in quality from the original. Experience shows that a consumer who buys a product or service, virtually no attention paid to the fact that someone raised in the exclusive trademark rights or not. The main goal is to get the customer required quality product for a certain amount of their money. If consumers will not hold product quality or price / quality ratio, in the future it is likely to give up buying this brand, and its holder is not objectively objectively lose customers (we can talk about how one particular customer and a share of the target market).

2. Reduction in market share, which was made available to the trademark holder. The presence of this type of damage occurs in the case where counterfeit products no significant differences in quality from the original. But for dear goods market size is appropriate limits, which are not easy to expand. The additional products made with the same utility value will inevitably lead to some negative consequences Manufacturer: decrease in sales of original products and the creation of surplus stocks; the need to reduce prices to eliminate surplus stocks (according to the law of demand). Note that in this case the capacity of the target market may not change or may keep growing, but the relative share of the copyright owner (licensor and / or licensee) will decrease, not increase, or will grow at a slower pace.

3. shortfall copyright holder of license fees. The practice of patent licensing market economy requires a license agreement between the patent (the licensor) and patentokorystuvachem (the licensee), which provides for official permission for the use of his intellectual product. For permission Licensee shall pay Licensor a fee in the form of royalties or lump sum payment or a combination thereof. If the trademark rights or other object of intellectual property violations, then wipe holder of such payments of existing license agreements due to the fact that some products sold in the market were replaced counterfeiting or commercial bids for the supply of more favorable for sellers and consumers (especially in price terms) conditions. Accordingly, its total revenues are reduced, which reduces not only the valuation of intellectual property, but also the value of the business as a whole. Especially noticeable economic losses may be in the case where the license fees received by Licensor a royalty (there is a direct correlation, licensed products sold less - less than the absolute amount of royalty payments).

4. Increase of constant advertising costs. The value and prestige of the product and, consequently, its brand is largely provided advertising and informational influence of market process. All costs of financing this process usually performs holder, so in violation of trademark rights, ie the emergence of the market counterfeiting (counterfeit), the effectiveness of promotional activities will have a tendency to reduction objective. In these circumstances, to achieve goals related object of the present intellectual property, there is a need to increase spending on additional advertising and information measures to restore goodwill and trust of consumers in relation to the right to IPO. Conducting such measures will also contribute to enhanced support for original products that can somehow compensate various kinds of negative consequences that may occur in the target market as a result of it the appearance of counterfeit goods.

5. shortfall in revenue or profit (loss of profits) by the owner or holder of the exclusive license (the licensee) due to the fact that part of the product sold in the market were replaced counterfeiting. This holder was unable to independently sell (hold supplies) original product of the territory or market the patent infringer due to supply counterfeit (false) product or use a patented method of its production in the patent. Our studies indicate that the received benefit or loss of profits in highly complex definitions and proofs. In its definition and justification to show the presence of a causal relationship between the facts improper actions violator and damages. In order to obtain the necessary information required for the calculation of the size of the examination of actual loss based on retrospective analysis and research practices similar violations, to determine the actual conditions of the exclusive rights violations received by the offender income, potential and plans of the authors, and determining the presence and depth of the relationship between these factors.

6. shortfall in revenue or profit (loss of profits) by the owner as a result of the breakdown of the conclusion of commercial agreements with potential licensees directly knitted with the appearance of the target market of counterfeit (false) product or use a patented method of its production in the potential of the license, which was supposed to give third party interest and to which a third party as a result of actions of the offender was reduced or completely lost. A similar situation can occur and when the opportunity assignment of a patent on certain commercial terms, but due to the same circumstances, and this agreement may be impossible, which potentially could result in loss of potential opportunities for patent income (loss of profits).

7. Potential damages (lost profits) resulting from the total or partial failure of counterparties operating supply batches produced using intellectual property (inventions, utility models, industrial designs, etc.) are protected by patents. Along with this are also possible cases of collapse of

negotiations with potential consumers of such products in connection with the appearance on the market of counterfeit (false) products or commercial offers to its delivery to more profitable for sellers and consumers (in price terms) conditions. Status profits in this area can get the status of direct damage if refusal to supply concerns are output. And this situation is more than possible, since there is not always supply evenly stocks of finished products may vary as zero (absent stocks) and to a very large size.

8. Direct economic losses, along with the loss of profits arising in licensor (property) and if the licensee on its own initiative exceeds the amount referred to it licensed the exclusive rights in relation to production volumes; area where it is produced, sold and consumed; type of license, etc. For example, under license, the licensee has the right to release products in 1000, for this number the licensor paid a fee (lump-sum payment) which do not vary with production volumes exceeding the licensee. That is, in this case the offender is a licensee, assigns part of the profits that rightfully belongs to the licensee (direct economic losses). If it was not, the licensor at least increase the amount of lump sum payment or royalties, or could find new licensees in more favorable conditions (loss of profits).

9. The increase in unit costs holders logistics. When counterfeit products to market trend in the number of holders rates and sales of original products is reduced, which can lead to an increase in product inventory holder (according to increased costs for their service), changes in schedule and rhythm as transportation of products in stock, and the space direct selling.

10. Direct economic losses licensor in connection with the early rupture of license agreements on the initiative of the licensee because of losses in the use of available licenses and deciding on its inefficient use. Moreover, a number of measures that have been or could be taken to correct violations in exclusive rights have not yielded positive results. Or these effects have not been sufficiently effective.

11. Economic losses from the production of surplus products. In some cases, damage to this area can be significant, as the future of the already made original products, with a potential replacement demand for counterfeiting (forgery), remains uncertain. Here there may be different options, the holder can realize surplus agricultural products, but at a discounted price within cost (losses will apply only to foregone revenue); holder can realize surplus agricultural products at prices less than the cost (losses will apply not only foregone profits, but losses to compensate for part of the cost); holder simply has no chance to sell surplus production (losses will apply not only foregone profits and losses in compensation costs, but will need additional cost of waste disposal, net residual value - for example, the price of scrap metal).

12. Related economic losses, the essence of which is that the complexity of the production, sale and use of original products may affect the other products that are in some way related to the main products. This may relate to: the volume of production and marketing (corresponding volumes of profits), where data items are part; spare parts for original products, providing services for this product (installation, commissioning, maintenance, force majeure service - removing sudden failures, etc.); further expansion of the consumer as the main product; initial capital investment to expand production of original products, which can not be grounds; marketing expenses elaboration of new markets that may be in vain; other related economic losses.

13. Non-pecuniary damage (loss) inflicted holders as individual (additional to the direct and potential economic damages by the court) or damage caused to the right holder reputation as a legal entity (reduction of the valuation of goodwill). The latter can be determined on the basis of certain quantitative economic calculations, since, unlike the moral harm to an individual, there is some

scientific and methodological basis for the calculation of the value of goodwill to the violation of the rights holder and after the violation has been made. When moral damages in this context propose understand non-property losses due to moral or physical suffering or other negative effects caused by a natural or legal person (holder. Inventor, author of a work of science, literature, art and architecture) a breach of moral (exclusive) rights ie unlawful acts or omissions of others.

Conclusions. Developed and reasonable directions of forming direct economic damages and lost profits in violation of intellectual property determines the main industrial areas and school material profits. In addition, the use of the proposed algorithms and approaches allowing holders of trademarks minimize their costs in the protection of their rights and interests, as well as reduce risks trademarks of management as intangible assets.

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Keywords: intellectual property rights holders, rights violations, damages, lost profits, moral hazard

Ключові слова: інтелектуальна власність, правовласник, порушення прав, збитки, упущена вигода, моральна шкода

Ключевые слова: интеллектуальная собственность, правообладатель, нарушения прав, убытки, упущенная выгода, моральный ущерб